

**UNCONSTITUTIONALITY OF OBAMA'S  
EXECUTIVE ACTIONS ON IMMIGRATION**

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**HEARING**  
BEFORE THE  
**COMMITTEE ON THE JUDICIARY**  
**HOUSE OF REPRESENTATIVES**  
ONE HUNDRED FOURTEENTH CONGRESS  
FIRST SESSION

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Written Testimony of

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Before the

**United States House of Representatives**  
**Committee on the Judiciary**

**February 25, 2015**

Mr. Chairman and Honorable members of the committee, thank you for the opportunity to testify before you. My name is Stephen H. Legomsky. I am the John S. Lehmann University Professor at the Washington University School of Law. I have taught U.S. immigration law for more than 30 years and am the author (co-author starting with the fifth edition) of the law school textbook “Immigration and Refugee Law and Policy.” This book is now in its sixth edition and has been the required text for immigration courses at 183 U.S. law schools since its inception. From 2011 to 2013 I had the honor of serving as the Chief Counsel of U.S. Citizenship and Immigration Services, in the Department of Homeland Security. I have had the privilege of advising both Democratic and Republican administrations and several foreign governments on immigration policy. I have held visiting academic appointments at universities in twelve countries.

The issues that are the subject of today’s hearing are ones that I have studied carefully. While I appreciate that reasonable minds can and do differ about the *policy* decisions, I take this opportunity to respectfully share my opinion that the President’s actions are well within his *legal* authority. This conclusion is shared not only by the Justice Department’s Office of Legal Counsel, but also by the overwhelming majority of our country’s immigration law professors and scholars. On November 25, 2014, some 135 scholars and teachers of immigration law joined in a letter expressing their view that the recent executive actions are “well within the legal authority of the executive branch of the government of the United States.”<sup>1</sup> The signers are people whose years and often decades of studying, teaching, and writing on immigration law have immersed them in the intricacies of the governing statute and related law. They are very familiar with what the statute allows and what it forbids.

The principal executive actions at the heart of the debate are those announced by President Obama, and set forth in official memoranda from Secretary of Homeland Security Jeh Charles Johnson, on November 20, 2014. One memorandum, which I’ll refer to here as the “Prosecutorial Discretion Memo,” lays out the Secretary’s priorities for the apprehension,

<sup>1</sup> See <https://pcnnsatclaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/executive-action-law-prof-letter.pdf>. The quoted conclusion appears on page 7 of the letter.

Blackman II]. The charge appears to be that in practice no such individual evaluation – and no such discretionary determination – ever takes place. Given the wording of the memoranda, this claim amounts to saying that DHS employees have been systematically disobeying the Secretary’s clear and repeated instructions to exercise discretion in each case. Yet the critics have not offered any credible evidence to support that charge or any other reason to expect such a counter-intuitive result.

They have tried. Judge Hanen, in *Texas 2015* at 11, credited the assertion of USCIS adjudicator and union president Kenneth Palinkas that DHS leadership “has guaranteed that [DACA] applications will be rubber-stamped for approval.” *Texas 2015*, Doc. No. 64, Pl. Ex. 23 at 3 (hereinafter “Palinkas Dec.”). Mr. Palinkas’s sole support for that assertion was that DACA requests are adjudicated by USCIS Service Centers, which do not conduct in-person interviews. The Service Center adjudicators study the documentary record, however, and in addition background checks include submission of fingerprints and consultation of the relevant law enforcement databases. Since USCIS service centers perform the vast majority of all USCIS adjudications, the Palinkas assertion is in effect a wholesale indictment of the bulk of USCIS’s work. That the absence of in-person interviews automatically converts the Service Centers’ decisions into rubberstamp approvals will come as a surprise to the millions of applicants who have received USCIS denials over the years. It would certainly surprise the more than 38,000 DACA requestors who have been denied on the merits. *Texas 2015*, at 10 (not even counting the more than 40,000 rejections at the lockbox stage for errors such as incomplete applications, failure to enclose the application fee, etc.). At any rate the Service Center adjudicators may refer DACA requestors for field office interviews when they believe that the decision will depend on factors that can best be ascertained in that manner. Neufeld Declaration, para. 20 & App. C.

The judge similarly credited Mr. Palinkas’s unsupported, and wildly inaccurate, assertion of “a 99.5% approval rate for all DACA applications.” *Texas 2015* at 109 n.101, citing Palinkas Doc., para. 8. Yet the detailed data that USCIS had long posted on its public website shows an approval rate of only 95% — a number Judge Hanen casually minimized as coming from “other sources.” *Texas 2015* at 109 n.101. The actual denial rate of 5%, in other words, was approximately 10 times the 0.5% denial rate that Mr. Palinkas had invented. See USCIS website, [http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA\\_fy2014\\_qtr4.pdf](http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA_fy2014_qtr4.pdf) (through Sept. 30, 2014).<sup>10</sup>

<sup>10</sup> While some might assume at first blush that even 95% is a high approval rate, it is not high when one considers who actually files requests for DACA. An undocumented individual with some additional misconduct in his or her background is unlikely to proactively approach the government, reveal his or her name, address, undocumented status, and additional negative information, and provide fingerprints – nor is that person likely to send the government \$465 – if he or she is unlikely to receive deferred action. For all these reasons, DACA requestors tend overwhelmingly to have strong cases. A denial rate of 5%, therefore, provides no reason to believe that DACA requests are being rubber-stamped; to the contrary, it shows that thousands of denials occur even among this highly self-selected group. To the contrary, the fact that hundreds of thousands of DACA-eligible individuals have not requested it suggests there are many who fear they would be denied, either for failure to meet the threshold criteria or in the exercise of discretion.

Further, at Judge Hanen's request, the government provided several examples of cases where USCIS had denied DACA on discretionary grounds even though the requestors had met the threshold criteria. See *Texas 2015*, Exh. 44, Declaration of (Associate Director for Service Operations) Donald W. Neufeld, at 510, para. 18 [hereinafter the Neufeld Declaration]. In his sworn declaration, Mr. Neufeld stated that "USCIS has denied DACA even when all the DACA guidelines, including public safety considerations, have been met." *Id.* He furnished specific examples. They included cases where a person had committed or had attempted to commit fraud in *prior* applications or petitions (not in connection with the DACA requests themselves), or where a person met all the threshold criteria but had previously made a false claim of U.S. citizenship and had had prior removals. *Id.* Despite this record evidence, Judge Hanan stated that "No DACA application that has met the criteria has been denied based on an exercise of individualized discretion." *Texas 2015* at 109 n.101. Elsewhere in the opinion, he similarly stated that "the Government could not produce evidence concerning applicants who met the program's criteria but were denied" and on that basis "this Court accepts the States' evidence as correct." *Id.* at 11 n.8. Apart from the fact that the government had produced precisely such evidence – and at the judge's request – the states in fact did not submit *any* "evidence" that there had been no discretionary denials. They merely asserted, without any factual support, that the applications were being "rubberstamped."

Moreover, officers must exercise a great deal of discretion just to apply some of the broadly-worded threshold criteria themselves. Whether someone endangers the public safety, for example, is more than simply a matter of finding facts. How probable the danger has to be and how severe the potential harm has to be before someone will be considered a threat to public safety are matters of opinion, not fact. The same is true when the question is whether the person is a threat to national security. The fact that the discretion is exercised in applying the threshold criteria rather than separately after the threshold criteria have been met does not make the determination any less discretionary. See, e.g., *Gonzalez-Oropeza v. U.S. Attorney General*, 321 F.3d 1331, 1332-33 (11<sup>th</sup> Cir. 2003) (determinations of "exceptional and extremely unusual hardship," which is a statutory prerequisite for cancellation of removal, are discretionary and therefore unreviewable); *Romero-Torrez v. Ashcroft*, 327 F.3d 887, 889-92 (9<sup>th</sup> Cir. 2003) (same). Nor is there any apparent legal or policy reason to value either exercise of discretion more than the other. Either way, leadership is providing general guidance at the front end and officers, after considering the facts of the individual case, are exercising discretion at the back end.

As with most of its adjudications, USCIS officers use a standardized form when issuing denials. The DACA denial template has gone through several iterations. The earliest versions contained boxes that the adjudicator would check to indicate the reason for the denial. The listed reasons included the various threshold criteria for DACA and, as a ground for denial "*You do not warrant a favorable exercise of prosecutorial discretion because of other concerns*" [emphasis added]. See [http://legalactioncenter.org/sites/default/files/2013-HQFO-00305\\_Document.pdf](http://legalactioncenter.org/sites/default/files/2013-HQFO-00305_Document.pdf), page 442.<sup>11</sup> During my tenure as Chief Counsel of USCIS from October 2011 to October 2013, I

<sup>11</sup> Professor Blackman reproduces one of the older (undated) versions. See Blackman II, at 29. One of the checkboxes on that version covered certain criminal convictions and then added "or you do not warrant a favorable

personally recall seeing the DACA denial template and noticing the explicit inclusion of an option for discretionary denials. I do not believe that all the subsequent versions of the checkbox style template have been publicly released, but the only other versions that I have found similarly included this option. See <http://legalactioncenter.org/sites/default/files/DACA%20Standard%20Operating%20Procedures.pdf>, App. F (showing versions issued on March 13, 2013; May 2, 2013; and one undated version). The inclusion of that option reminds the adjudicators of the Secretary's instruction that DACA requests may be denied in the exercise of discretion even when all the threshold criteria have been satisfied. At any rate, it appears that USCIS has now switched from a checkbox format to a narrative format, at least if the final denial templates use the same format as the Notices of Intent to Deny (NOIDs) that are reproduced in the Neufeld Declaration at 554-55.

Judge Hanen also commented that (conversely) "there is no option for granting DAPA to an individual who does not meet each criterion." *Texas 2015* at 109. That statement is literally true but highly misleading. With or without DACA and DAPA, anyone may request deferred action for any of the humanitarian or other reasons for which deferred action had traditionally been granted; the fact that the DACA and DAPA criteria do not apply is not disqualifying.

Finally, even if the record had demonstrated that USCIS officers have been systematically disobeying Secretary Napolitano's explicit 2012 instructions to exercise discretion when deciding DACA requests – and as the above discussion shows, it does not – there is no basis for enjoining the future operation of DAPA. To do so requires further speculation that, in the future, officers will systematically disobey the instructions that Secretary Johnson issued in his November 20, 2015 memoranda. Once DAPA becomes operational, if evidence were to emerge that no discretion is actually being exercised, then there might well be cause for complaint. But when the Secretary's memoranda expressly require individualized case-by-case discretion, shutting down an entire program before it starts, based solely on speculation that officers might fail to exercise the discretion they've been ordered to exercise, is not defensible.

At any rate, an earlier decision by the federal district court for the District of Columbia specifically rejected the claim that USCIS adjudicators were not actually evaluating the facts of each individual case. *Arpaio v. Obama*, Civ. Action No. 14-01966 (BHH) (Dec. 23, 2014), at 31-32.<sup>12</sup>

d. One last attack on the specific use of deferred action in DACA and DAPA is the claim that, if these policies are legal, then there are no limits to executive power. A future President, these critics say, could refuse to enforce the civil rights laws, or the labor laws, or the environmental laws, or the consumer safety laws.

But this line of argument is similarly misconceived, for there are several substantial, concrete,

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exercise of prosecutorial discretion because of national security or public safety concerns." That language clearly conveyed to the officers that they were to exercise discretion when making public safety and national security determinations, but admittedly it didn't confirm that discretionary denials could also be based on other grounds.

<sup>12</sup> The court also held the plaintiff lacked standing to bring the suit.